Supreme Court, U.S.
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No. 972055 JUN 15 1998

IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JAMES HUNT BARKER, - - - - *Petitioner,*

versus

BANK ONE, LEXINGTON, NA, et al. - *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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June 15, 1998

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56 pp

QUESTIONS PRESENTED

Did the United States District Court for the Eastern District of Kentucky err in sanctioning Petitioner for conduct which allegedly occurred in the United States District Court for the Southern District of Florida?

Did the Respondents fail to comply with the "safe harbor" provisions of Rule 11, F.R.C.P., and if so, does this fact nullify the award of sanctions against the Petitioner for lack of jurisdiction?

Can a party who is represented by counsel be sanctioned pursuant to Rule 11, F.R.C.P., for the contents of a pleading which he did not actually sign, when no sanctions have been sought against the two attorneys who actually signed the supposedly offending pleadings?

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997
No. _____
James Hunt Barker, Petitioner
v.
Bank One, Lexington, N.A., et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT:

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

James Hunt Barker, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on February 11, 1998.

OPINION BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix A) was entered on February 11, 1998. Reconsideration was denied by Order dated March 16, 1998. (Appendix B)

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

Did the United States District Court for the Eastern District of Kentucky err in sanctioning Petitioner for conduct which allegedly occurred in the United States District Court for the Southern District of Florida?

Did the Respondents fail to comply with the "safe harbor" provisions of Rule 11, F.R.C.P., and if so, does this fact nullify the award of sanctions against the Petitioner for lack of jurisdiction?

Can a party who is represented by counsel be sanctioned pursuant to Rule 11, F.R.C.P., for the contents of a pleading which he did not actually sign, when no sanctions have been sought against the two attorneys who actually signed the supposedly offending pleadings?

PARTIES

James Hunt Barker, Plaintiff.

Bank One, Lexington, N.A., successor to First Security National Bank & Trust Company of Lexington; Bancone Ohio Corporation, an Ohio chartered multi-bank holding company financial management services; Bancone Corporation, an Ohio chartered multi-bank holding company owner of Bankone of Lexington, NA; Kit Stolen, Individually and as president of Bank One of Lexington, NA; William Rouse, Individually and as former president of First Security National Bank & Trust Company of Lexington; Jack Cunningham, Individually; William Hall, Individually and as trust officer of Bank One of Lexington, NA; R.C. Cranfill, Individually and as former trust officer of First Security National Bank and Trust Company of Lexington; Stoll, Keenon & Park; Diane M. Carlton; Charles E. Shivel, Jr., sued as Charles Shivel, Esq.; William T. Bishop, III, sued as William Bishop, Esq.; Lisabeth Ann Tully, sued as Elizabeth Ann Tulley, Esq.; Sturgill, Turner & Truitt; Donald Sturgill;

Ann Sturgill; Patrick Moloney; Gardner Turner; Deborah Gibby; William Rambicure; Ogden, Newell & Welch; Scott Wendelsdorf; John Ballentine; Julius Rather; Mary Jo Leeds; Walter May; Lawrence Sherman; Mary Jo Martin; Joseph E. Johnson; Miller, Griffin & Marks, P.S.C.; Thomas Miller; Steven Amato; Wyatt, Tarrant & Combs; Edwin Hobson; William McCann; Hopkins Thatcher; Charles M. Tackett; Martin Gebrow, M.D.; Angela Daniel, R.N.; Robert Granacher, M.D.; and Donna Westphal, Defendants.[1]

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[1] All parties to the consolidated appeals decided by United States Court of Appeals for the Sixth Circuit February 11. 1998 Opinion in the combined appeals of 96-5664 and 97-5211 and the subsequent Order of March 16, 1998 denying reconsideration have been named as Respondents herein for the purpose of completeness and opportunity to be heard. However, it appears that the real parties in interest on the limited issues for which this Petition seeks a writ of certiorari (regarding the sanctions which were awarded against Petitioner and from which Petitioner appealed in Appeal No. 97-5211 to the Untied States Sixth Circuit Court of Appeals) are limited to the Petitioner James Hunt Barker and the Respondents Bank One, Lexington N.A., Banc One Ohio Corporation, Banc One Corporation, Kit Stolen, William Rouse, Jack Cunningham, William Hall, R.C. Cranfill, Stoll, Keenon & Park, Diane M. Carlton, Charles E. Shivel, Jr., William T. Bishop, III., Lisabeth Ann Tulley and Angela Daniel (sometimes herein referred to as "the Bank One Defendants"); and the Respondents Sturgill, Turner & Truitt, Donald Sturgill, Ann Sturgill, Patrick Moloney, Gardner Turner, Deborah Gibby, the law firm of Miller, Griffin & Marks, P.S.C., Steve Amato, and Tom Miller (sometimes hereinafter "the Sturgill Defendants").

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STATUTE INVOLVED

Rule 11, F.R.C.P. (Appendix B)

STATEMENT OF THE CASE

This Petition seeks a Writ of Certiorari for this Court to address the interpretation to be given to the 1993 changes to Rule 11 of the Federal Rules of Civil Procedure regarding the substantive and procedural issues relating to the judicial imposition of monetary sanctions in civil litigation.

This Court has not considered such issues since the 1993 revisions to F.R.C.P. Rule 11, and a conflict of jurisprudence has arisen regarding the effect of said 1993 amendments which requires clarification by this Court.

This action arises out of a Complaint filed by James Hunt Barker (hereafter "Petitioner") on May 25, 1994, in the United States District Court for the Southern District of Florida, against forty-one (41) individual and corporate defendants (hereafter "Respondents") allegedly arising from acts and proceedings denying Petitioner an inheritance which he claimed to have been due to him. That Complaint alleged that the Respondents had violated the RICO statute, 18 U.S.C.

§ 1961 *et seq.* and the Civil Rights statute, 42 U.S.C. § 1983; it also alleged various related state causes of action. The Complaint was signed by Attorneys Louis Wilson Ingram of Washington, D.C. and H. Bryant Sims of Palm Beach, Florida, as counsel of record. It was not signed by the Petitioner.

On December 9, 1994, thirteen (13) of the Respondents, in lieu of Answering, filed a Motion to Dismiss the Complaint or, in the alternative, to transfer venue to the United States District Court for the Eastern District of Kentucky. The Florida court granted the Respondents' Motion and transferred venue to Kentucky on November 21, 1994. Thereafter on March 2, 1995, the Defendants renewed their Motion to Dismiss. Following the change of venue, Attorney William Lloyd Turner entered an appearance as replacement counsel for Barker.

After the parties had briefed the issue, the District Court granted the Respondents' Motions to Dismiss on September 28, 1995. Because not all of the parties Defendant had joined in the Motions to Dismiss, this did not terminate the action as to them, and the case was not finally dismissed as to all parties until April 11, 1996. Barker then filed a timely Notice of Appeal on May 13, 1996.

On November 14, 1995, nine (9) of the Defendants (referred to in the trial court's order as "the Sturgill Defendants") moved the Kentucky court to impose sanctions upon Barker and upon his Kentucky counsel, William Lloyd Turner, pursuant to Rule 11, F.R.C.P. Their Motion related solely to allegations made in the initial Complaint and did not refer to any paper which had been filed in the action after Turner entered the case. Nevertheless, the Defendants did not seek to sanction either Ingram or Sims, the attorneys who had signed the Complaint. The court granted this Motion by Order entered April 11, 1996, and directed the Defendants to file an accounting of their fees and expenses incurred in defending the action.

Thereafter, on May 31, 1996, Defendants Bank One and Stoll, Keenon & Park (referred to by the court as "the Bank One Defendants") filed a Motion for Sanctions pursuant to Rule 11, F.R.C.P. The court, by Order dated January 13, 1997, granted the Defendants sanctions against Barker and Turner, jointly, in the amount of $5,083.62. It also granted additional sanctions against Barker alone in the amount of $25,741.01. The court entered an Order awarding sanctions to the Bank One Defendants on April 29, 1997. Barker was ordered to pay

sanctions in the amount of $12, 914.05. Barker and Turner were jointly ordered to pay further sanctions in the amount of $15,726.75.

Barker timely appealed from this Judgment, as a *pro se* litigant. The United States Court of Appeals for the Sixth Circuit denied his appeal by Order dated February 11, 1998. Barker timely moved to Alter or Amend this Order, and that Motion was denied. This Petition for Certiorari is now brought on the sole issues of the substantive and procedural propriety of the sanctions imposed March 16, 1998.[2]

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[2] Counsel for Petitioner concedes *ab initio* that, as noted by the Sixth Circuit in its Order (sl. op. at 3), "although Barker filed a separate *pro se* notice of appeal from this order (the order imposing sanctions), he has not addressed the sanctions issue in his brief on appeal." However, the "Bank One Appellees" in their Brief to the Sixth Circuit did address such issues (at p. 15-18 of their Brief) below, and this issue was directly reviewed and ruled upon by the Sixth Circuit. Moreover, the Sixth Circuit panel specifically in its decision found no abuse of discretion in the order assessing Rule 11 sanctions against Barker, and affirmed the award of attorney fee sanctions in its ruling (at sl. op. 4).

For reasons stated *infra* at p. 11-12, because Petitioner (now with counsel) asserts that the mandatory prerequisites to the imposition of sanctions had not been satisfied, these matters are properly raised and presented to the Court by the Petitioner herein.

As the court below noted, Barker, proceeding *pro se*, did not brief this issue in his appeal. However, compliance with the "safe-harbor" provisions "is a mandatory procedural prerequisite," the absence of which deprives the court of jurisdiction to hear the case. 2 J. Moore, supra, §11.22 [2][b] at n.7; Ridder, 109 F.3d at 296 ("an absolute requirement"). Therefore, it may be raised here for the first time. *Panhandle Eastern Pipe Line Co. v. Federal Power Com*, 324 US 635, 638 (1945); *Rose v. Himely*, 8 U.S. 241, 269 (1808); Rule 12(h)(3), F.R.C.P.

REASONS FOR GRANTING THE WRIT

I. RULE 11 SANCTIONS SHOULD BE CAUTIOUSLY APPLIED.

The Court should note, first of all, that Rule 11 sanctions should be applied with caution, and only in the clearest of cases. As the Second Circuit has noted, a court imposing Rule 11 sanctions must:

> ...not...stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself. Courts must avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer.

Eastway Construction Corp. v. City of New York, 762 F.2d 245, 254 (2d Cir. 1985); *Knipe v. Skinner*, 19 F.3d 72, 78 (2d Cir. 1994)("any and all doubts must be resolved in favor of the signer"); *Roderick v. City of Schnectedy*, 1 F.3d 1341 (2d Cir. 1993)("when divining the point at which an argument turns from merely losing to sanctionable...we have instructed district courts to resolve all doubts in favor of the signer").

Of course, *Eastway* was decided prior to the 1993 amendments to Rule 11. These amendments, however, have not nullified that

holding; on the contrary, they have reaffirmed and strengthened it. As one Federal District Court has noted:

> The later 1993 amendments to Rule 11...discourage imposition of monetary and other sanctions under the Rule where conduct does not "reach the point of clear abuse..."

Fontaine v. Ryan, 849 F.Supp. 242, 245 (S.D.N.Y. 1994); *Anyanwu v. CBS,* 887 F.Supp. 690, 694 (S.D.N.Y. 1995)(same); *Mareno v. Jet Aviation of America,* 155 F.R.D. 74, 76 (S.D.N.Y. 1994)(1993 amendment "downgra[ded]" Rule 11 as weapon against litigation abuse); *see,* 2 J. MOORE, MOORE'S FEDERAL PRACTICE, § 11.03 at n. 9 (Matthew Bender 3d ed. 1997)

Accordingly, the Third Circuit has noted that Rule 11 sanctions are appropriate "only if the filing of the complaint constituted abusive litigation or misuse of the court's processes." *CTC Imports and Exports v. Nigerian Petroleum,* 951 F.2d 573, 579 (3d Cir. 1991); *Servicemaster Co., L.P. v. FTR Transport, Inc.,* 868 F.Supp. 90, 97 (E.D. Pa. 1994); *see, Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 397 (1990)(Rule 11 sanctions available only when an attorney "has abused the judicial process"); *In re. Kouterick,* 167 B.R. 353, 362 (Bkrtcy D. N.J. 1994)("Rule 11 sanctions are to be imposed only in

exceptional circumstances where the claim or motion is patently unmeritorious or frivolous").

Furthermore, in applying Rule 11, the Court should note that "the mere fact that an action is without merit does not amount to bad faith," requiring the imposition of sanctions. *Miracle Mile Assoc. v. City of Rochester,* 617 F.2d 18, 21 (2d Cir. 1980), *citing, Runyon v. McCrary,* 427 U.S. 160, 183-84 (1976).

In a case which arose on facts closely analogous to those of the case at bar, one federal court noted:

> Sanctions are an extraordinary remedy...Therefore, courts should not grant sanctions on a whim, nor should a party move for sanctions without scrupulously following the procedures for such a request. It is difficult, if not impossible, for a party to move for sanctions without scrupulously following the procedures for such a request.

Brown v. Pierce Mfg. Co., 169 F.R.D. 118, 119 (E.D. Wis. 1996)

As shown below, the Respondents absolutely failed to show that the Petitioner committed any sanctionable conduct whatever. Moreover, the Respondents made no attempt to comply with the mandates of the "safe harbor" provision, Rule 11(c)(1)(A), F.R.C.P. The court, therefore, should have denied their Motion, and its failure to do so was reversible error.

II. PETITIONER DID NOT PERSONALLY SIGN THE INITIAL COMPLAINT.

This Petition raises the question of whether under the 1993 revision of Rule 11, a represented party can be sanctioned for filing a paper which he did not personally sign. Petitioner insists that under all existing case law at the time of the supposed violations, a party could be sanctioned only for pleadings and papers which he had actually signed. Such was clearly the law prior to December 1, 1993, the date on which the Revised Rule 11 became effective. *Pavelic & LeFlore v. Marvel Group,* 493 U.S. 120 (1989); *In re Ruben*, 825 F.2d 977 (6th Cir. 1987).

Under the pre-1993 version of the rule, therefore, the Petitioner would have been liable only for the contents of papers which he had actually signed. Since the respective Motions for sanctions referred only to the initial Complaint, which the Petitioner did not sign, these Motions would have been denied under the former rule.

Evidently recognizing this fact, the trial court premised Petitioner's liability on the supposed violations of Rule 11 as revised in 1993. The court apparently relied on the parenthetical language of Rule 11(b) that expands liability to those "signing, filing, submitting, or later

advocating" a pleading. Respectfully, Petitioner insists that the court misapplied the rule.

Under the Revised Rule 11, a represented party who is responsible for a violation of Rule 11 evidently may be sanctioned, even if he did not sign the offending pleading. 2 J. MOORE, MOORE'S FEDERAL PRACTICE § 11.23[6][c][i] at n. 42 (3d ed. 1998). However, whether such a sanction is imposed depends upon the extent of the client's involvement in the management of the litigation, and in the decisions that resulted in a violation of the Rule. *Independent Fire Ins. Co. v. Lea,* 979 F.2d 377, 378 (5th Cir. 1992)(reversing sanctions against two plaintiffs who had no active role in the litigation).

A represented party may be sanctioned if he has intentionally lied to his attorney about the facts of the case. *Mars v. Anderman,* 136 F.R.D. 351 (E.D.N.Y. 1989). However, a represented party may not be ordered to pay monetary sanctions for what are later held to be frivolous legal arguments. Rule 11(c)(2)(A), F.R.C.P.; *Hodges v. Yonkers Racing Corp.*, 48 F3d 1320, 1328 (2d Cir. 1995); *Barrett v. Talon,* 30 F.3d 1296, 1302-03 (10th Cir. 1994).

For example, in *Bakker v. Grutman,* 942 F.2d 236 (4th Cir.

1991), the Fourth Circuit stated that the plaintiffs should not be sanctioned for filing a frivolous action since they had acted on the advice of their attorneys and had not participated in the lawsuit in any significant way.

Similarly, in *Harrison v. Dean Witter Reynolds, Inc.*, 132 F.R.D. 184 (N.D. Ill. 1990), the court sanctioned the attorney rather than the plaintiffs, since the sanction was imposed for a failure to investigate the law. The court observed that "there seems little value or deterrence in sanctioning a party for an attorney's failure to reasonably investigate the law." *Harrison*, 132 F.R.D. at 193.

Applying this rule to the case at bar, District Judge Forester does not appear to have even undertaken such an inquiry, much less to have decided the question correctly. Barker never gave testimony in this action, and there was no other evidence in the Record from which Judge Forester could have discerned the degree of Barker's active involvement in the litigation.

Moreover, the general tenor of Judge Forester's Order shows that he regarded the Complaint as not "warranted by existing law." Petitioner pleaded the facts in painstaking detail; none of those facts

was disproven (since no discovery was taken), and there is absolutely no indication that Judge Forester believed the Complaint was not "well-grounded in fact."[3] Therefore, the Respondents did not show that they were entitled to sanctions, and the Appeals Court should have granted the Petitioner's appeal.

III. RESPONDENTS DID NOT COMPLY WITH THE "SAFE HARBOR" PROVISIONS OF RULE 11(c)(1)(A), F.R.C.P.

There is another independent grounds for granting the Petition, namely, that the Respondents have failed to comply with the requirements of Rule 11(c)(1)(A), F.R.C.P.

That Rule states, in pertinent part:

> A motion for sanctions under this rule...shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion...the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Compliance with this provision is an absolute prerequisite to filing a Rule 11 motion. As the Sixth Circuit has recently stated:

> Rule 11 cases emerging in the wake of the 1993 amendments have found the "safe harbor" provision to be an

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[3] The fact that it is impossible to determine which subsection of Rule 11 was supposedly violated, is itself reversible error. *Brown v. Pierce Manufacturing Co.*, 169 F.R.D. 118, 119-20 (E.D. Wis. 1996)

> absolute requirement. (citing cases) We agree that the rule is unquestionably explicit with respect to this issue. The plain language of Rule 11 specifies that unless a movant has complied with the twenty-one day "safe harbor" service, the motion for sanctions "shall not be filed with or presented to the court." (Defendant) did not comply with the "safe harbor" procedural prerequisite; therefore, (its) motion should not have been presented to the court.

Ridder v. City of Springfield, 109 F.3d 288, 296 (6th Cir. 1997).

The treatise Moore's Federal Practice similarly states:

> This "safe-harbor" provision is a mandatory procedural prerequisite. Sanctions imposed without compliance are subject to reversal.

2 J. MOORE, *supra*, § 11.22 [2][b] at n. 7

To the same effect are the holdings of *Hodges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1323, 1328 (2d Cir. 1995)(Rule 11 "specifically mandates" safe-harbor service); *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995)("The plain language of the rule indicates that this notice and opportunity prior to filing is mandatory"); *Morganroth & Morganroth v. DeLorean*, 123 F.3d 374, 384 (6th Cir. 1997); *In re VMS Securities Litigation*, 156 F.R.D. 635, 641 (N.D. Ill. 1994); *Thomas v. Treasury Management Ass'n., Inc*, 158 F.R.D. 364 (D. Md. 1994)(compliance with safe-harbor provisions an "absolute prerequisite"); *Omega Sports, Inc. v. Sukyong America, Inc.*, 872 F.

Supp. 201, 203 (E.D. Pa. 1995); and *Conn. General Life Ins. Co. v. Thomas*, 910 F. Supp. 297, 304-05 (S.D. Tex. 1995)

The "safe harbor" provision also requires that a movant file his motion promptly upon discovery of the violation, and before the termination of the case. As the Official Commentary to the revised Rule states:

> Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely...Given the "safe harbor" provisions...a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Advisory Committee's Notes to 1993 revision to Rule 11, F.R.C.P., 146 F.R.D. at 590.

Courts, accordingly, have found that if a motion for sanctions is not filed promptly after the discovery of the sanctionable conduct, it is untimely. *Landon v. Hunt*, 938 F.2d 450 (3d Cir. 1991)(six months delay unreasonable); *Sussman v. Salem, Saxon & Nielsen*, 818 F.Supp. 1510 (M.D. Fla. 1993)(one year delay unreasonable); *Vandeventer v. Wabash Nat. Corp.*, 893 F.Supp. 827 (N.D. Ind. 1995)(five months delay unreasonable).

Furthermore, a Rule 11 motion absolutely may not be filed after

the entry of an Order dismissing the case. As the treatise Federal Procedure Lawyer's Edition sets out the rule:

> A party cannot circumvent the purpose of the safe harbor provision by waiting until after the case is settled or the claims dismissed to move for sanctions, since there is then nothing for the offending party to amend or correct.

27A FED. PROC. L.ED. §62:861 at n. 22 (1996), *citing, Progress Federal Savings Bank v. Lenders Ass'n, Inc.*, 1996 WL 57942 (E.D. Pa. 1996); Comment, *A Practitioner's Guide to the 1993 Amendment to Federal Rule of Civil Procedure 11*, 67 TEMPLE L. REV. 265, 285 n. 136 (1994)("the safe harbor period precludes a party from deferring service on a Rule 11 motion until the conclusion of the case"), *citing, Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 100 (3d Cir. 1988).

The Sixth Circuit has specifically adopted the foregoing rule. In *Ridder*, it stated unequivocally:

> By virtue of its nature, the "safe harbor" provision cannot have any effect if the court has already entered judgment in the case; it is too late for the offending party to withdraw the challenged claim...(Defendant) has given up the opportunity to receive an award of Rule 11 sanctions in this case by waiting to file the motion until after the entry of summary judgment...a motion for sanctions under Rule 11 must be served on the offending party for a period of "safe harbor" at least twenty-one days prior to the entry of final judgment or judicial rejection of the offending contention. A party seeking sanctions must leave sufficient opportunity for

> the opposing party to choose whether to withdraw or cure the offense voluntarily before the court disposes of the challenged contention.
>
> Pragmatic realities require such strict adherence to the rule's outlined procedure. By delaying the motion until after summary judgment was granted, (defendant) deprived Ridder's counsel of the "safe harbor" to which the rule says he is entitled. Had (plaintiff's) counsel been allotted his "safe harbor" service, he could have avoided sanction by withdrawing the claims against (defendant). That is the very essence of a "safe harbor." Instead,(plaintiff's) counsel was unable to choose for himself whether to continue asserting claims against the (defendant) when faced with a potential payout from his own pocket...
>
> In sum, adhering to the rule's explicit language and overall structure, we hold that sanctions under Rule 11 are unavailable unless the motion for sanctions is served on the opposing party for the full twenty-one day "safe harbor" period before it is filed with or presented to the court; this service and filing must occur prior to final judgment or judicial rejection of the offending contention. Quite clearly, then, a party cannot wait until after summary judgment to move for sanctions under Rule 11.

Ridder v. City of Springfield, 109 F.3d at 296-97

Applying this rule to the facts of the case at bar, it is clear that the Respondents' Motions for sanctions should not have been filed with or presented to the court, and that the trial court accordingly lacked jurisdiction to consider them. As noted above, there were two groups of defendants who filed separate Motions for Sanctions. The "Sturgill

Defendants" filed their Motion for Sanctions on November 14, 1995, nearly seven weeks after the court had dismissed the action as to them. The "Bank One Defendants" filed their Motion to Dismiss on May 31, 1996, more than eight months after the court had dismissed the action as to them.

It is obvious, therefore, from the face of the Record, that neither group of defendants complied with the "safe harbor" provisions of Rule 11. Under the foregoing rule, this fact constituted an absolute bar to the filing of that motion, or its consideration by the trial court. Accordingly, the court should not have granted the Defendants' motion; and the Appellate Court should have granted Petitioner's appeal.

IV. A LETTER IS NOT A "MOTION."

It is true, of course, that prior to dismissal, both groups of Defendants sent a letter to Petitioner advising him that they considered his conduct sanctionable. Respondents may contend that having done this, they were not required to serve the Petitioner with a copy of the Motion itself, prior to dismissal.

If such be their contention, Respondents are mistaken, for a number of reasons:

(1) Since the 1993 revision, "a Rule 11 motion cannot be made unless there is some paper, claim, or contention that can be withdrawn." *Ridder*, 109 F.3d at 295, *citing*, Varro, *infra*, at 65.

Therefore, as the Sixth Circuit has stated:

> ...it follows that a party cannot wait to seek sanctions until after the contention has been judicially disposed of.

Ridder, 109 F.3d at 295.

The operation of this rule does not depend upon whether the party to be sanctioned has been properly served with notice. The *Ridder* court specifically noted that even when the opponent has received proper notice:

> If the court disposes of the offending contention before the twenty-one day "safe harbor" period expires, a motion for sanctions cannot be filed with or presented to the court.

Ridder, 109 F.3d at 295.

Consequently, as Dean Varro observed:

> ...a party need not have to worry about post-dismissal sanctions from either the adversary or the court.

Varro, *infra*, at 65.

Petitioner reiterates, if a claim is dismissed without a sanctions

motion having been filed, the plaintiff's Rule 11 liability is at an end. Therefore, even if the Respondents' letters had afforded the Petitioner adequate notice (and they did not), Respondents nevertheless waived their right to move for sanctions by waiting until after the case had been dismissed to file their Motions.

(2) The "safe harbor" provision contemplates two different kinds of notice: "informal notice", i.e., a letter, personal contact, or telephone call; and "formal notice", i.e., service of a Motion. WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: Civil 2d § 1337 at n. 3 (1996 Supp.).

The Official Commentary states:

> ...the "safe harbor" period begins to run upon service of the motion.
>
> In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

Advisory Committee Notes on 1993 Amendments (emphasis added).

It is clear, therefore, that the Rule contemplates two separate kinds of notice, "formal" and "informal." Moreover, while "informal" notice is optional, "formal" notice is mandatory.

(3) "Informal" notice does not satisfy the requirements of Rule 1 l(c)(l)(A), nor does it obviate the necessity for "formal" notice. Indeed, the reported cases which have considered this question have reached the opposite conclusion.

(a) *Sears, Roebuck & Co. v. Sears Realty Co., Inc.*, 932 F.Supp. 392 (N.D.N.Y. 1996), holds that a letter to opposing counsel does not satisfy the requirements of Rule 1 l(c)(l)(A). *Sears, Roebuck & Co.*, 932 F. Supp. at 408 ("Neither the letter nor the oral request to withdraw the motion constitute sufficient notice to defendants within the meaning of the 'safe harbor' provisions of Rule 11").

(b) A year earlier, the same court pointedly stated that the requirements of Rule 11 are not met where a party "has simply threatened to seek Rule 11 sanctions." *Spencer v. Cohen*, 886 F.Supp. 235, 236 (N.D.N.Y.1995).

(c) In *Bowler v. U.S. I.N.S.*, 901 F.Supp. 597 (S.D.N.Y. 1995), the court specifically refused to impose sanctions because it did not believe that a letter satisfied the requirements of Rule 11(c)(1)(A). *Bowler v. U.S. I.N.S.*, 901 F. Supp. at 604.

(d) In *Thomas v. Treasury Management Association, Inc.*, 158

F.R.D. 364 (D.Md. 1994), the court stated that in addition to "a simple phone call or letter," a party seeking Rule 11 sanctions must also give the party sought to be sanctioned "formal notice of intent to file a motion for sanctions." *Thomas*, 158 F.R.D. at 369.

(e) In *Lancaster v. Zufle*, 170 F.R.D. 7 (S.D.N.Y. 1996), the defendant conceded that she had failed to formally comply with the "safe harbor" provisions of Rule 11. She nevertheless "ask[ed] the court to deem as the equivalent of compliance a letter sent by defendant's counsel" warning him to withdraw the suit.

The court "declin[ed] to accept this as meeting the requirements of Rule 11(c)(1)(A)" because:

> ...the plain language of the Rule expressly requires the serving of a formal motion, and with good reason, for by serving such a motion a movant itself certifies its own compliance with Rule 11 in bringing such a motion and thus places its adversary on notice that the matter may not be viewed as simply part of the paper skirmishing among adversaries that too often characterizes litigation in this uncivil age.

Lancaster, 170 F.R.D. at 7.

In a footnote, the court added:

> *A fortiori*, defendant's postjudgment letters to plaintiff...can likewise in no way be deemed the equivalent of compliance with the "safe harbor."

Lancaster, 170 F.R.D. at 7 n. 1.

A similar rule must govern the case at bar. "Writing a letter" is not the same as "serving a motion."[4] This Court should require "strict adherence to the rule's outlined procedures." *Ridder*, 109 F.3d at 297.

> ...sanctions under Rule 11 are unavailable unless the motion for sanctions is served on the opposing party...prior to final judgment or the rejection of the offending contention.

Ridder, 109 F.3d at 297.

Therefore, Respondents' letters did not afford Petitioner the "specific written notice" required by Rule 11.

(4) As noted above, Rule 11 is an extremely harsh remedy which should be applied with caution, and only in the clearest of cases. *In re Kouterick*, 167 B.R. 353, 362 (Bkrtcy. NJ. 1994).

Furthermore, all doubts are resolved in favor of the attorney or party sought to be sanctioned. *Tripe v. Skinner*, 19 F.3d 72, 78 (2d Cir. 1994); *Roderick v. City of Schnectedy*, 2 F.3d 1341 (2d Cir. 1993).

A contrary interpretation would require the Court to substitute

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[4] Indeed, Dean Varro has stated that the very purpose of the revision was to prevent counsel from threatening Rule 11 sanctions in a letter, without serving a formal motion. G. Varro, *The New Rule 11: Past as Prologue?*, 28 LOY. L.A.L.R. 39, 63 (1994)

the word "letter" in place of the word "motion." Such a "substantial compliance" argument is dubious, at best. As the foregoing cases demonstrate, any doubt must be resolved against the imposition of sanctions. Therefore, if it is even doubtful that a letter satisfies the requirements of Rule 11, that doubt must be resolved in the Petitioner's favor.

V. THE CIRCUITS ARE SPLIT ON THIS QUESTION.

The Court should grant certiorari in order to resolve a split which has arisen among the circuits on this question. While the language of the revised Rule 11 seems clear, at least two circuits appear to be following a disparate rule.

In *Smith v. CB Commercial Real Estate Group, Inc.*, 947 F. Supp. 1282 (S.D. Ind. 1996), the court stated that under the Seventh Circuit's interpretation of Rule 11;

> ...the latest a party may timely move for Rule 11 sanctions...is 30 days after entry of final judgment.

Smith, 947 F. Supp. at 1284, *citing, Burda v. Ecker Co.*, 2 F.3d 769, 774 (7th Cir. 1993).

The Complaint in *Smith* was filed on January 6, 1995; therefore, the action was clearly subject to the provisions of the revised

Rule 11. Moore's Federal Practice cites *Smith* as setting out the correct rule for the Seventh Circuit. 2 J. MOORE, *supra*, § 11.22[1][c] at n. 15, *citing, Smith* and *Kaplan v. Zenner*, 956 F.2d 149, 151-52 (7th Cir. 1992).

Moore further states that in the Fourth Circuit, a Rule 11 Motion may be filed until twenty days after the entry of judgment. 2 J. MOORE, *supra*, § 11.22[1][c] at n. 15, *citing, Ortega v. Geelhaar*, 914 F.2d 495, 497-98 (4th Cir. 1990).

On the other hand, as shown above, both the Third Circuit and the Sixth Circuit, as well as the unequivocal language of the Rule itself and the Official Commentary thereto, state that a Rule 11 Motion cannot be filed after the case has been dismissed.[5] This Court should grant certiorari in order to resolve this important question.

VI. RESPONDENTS ARE IN THE WRONG COURT.

There is yet another reason why the Respondents should not prevail, namely, they filed their Motion in the wrong court. As this

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[5] There is also a split among Federal District Courts concerning whether a letter satisfies the notice requirement. As noted above, the Northern District of New York, the Southern District of New York, and the District of Maryland have all held that it does not. However, another division of the Southern District of New York, in an unreported case, has reached the opposite conclusion. *Little v. Twentieth Century-Fox Film Corp.*, No. 819CIV.8526, 1996 WL 376971 (S.D.N.Y. 1996).

Court will note, Judge Forester sanctioned the Petitioner not only for conduct which (supposedly) occurred in the Eastern District of Kentucky, but also for conduct which occurred in the Southern District of Florida before the action was transferred.

A transferor court obviously retains jurisdiction to impose Rule 11 sanctions for actions which occurred before the case was transferred. *Laine v. Morton Thiokol, Inc.*, 124 F.R.D. 625, 626-27 (N.D. Ill. 1989).

Furthermore, this is the only venue where the Motion for Sanctions should have been brought. Petitioner directs the Court's attention to the holding of *GRiD Systems Corp. v. John Fluke Mfg. Co.,Inc.*, 41 F.3d 1318 (9th Cir. 1994). That holding concerns a sanctions Motion filed pursuant to 28 U.S.C. § 1927. However, as the court noted, the provisions of that section parallel those of Rule 11.

In its opinion, the Ninth Circuit stated that § 1927:

> ...limits a federal court's ability to sanction an attorney for conduct before another court. Here [the Respondents] took no action before the district court. They did not multiply proceedings in the case before the district court...§ 1927 cannot reach conduct of a party who is not involved in an action before the sanctioning court at the time of the conduct.

GRiD Systems, 41 F.3d at 1319

Applying this rule to the case at bar, it is clear that Judge Forester should have sanctioned the Petitioner, if at all, only for conduct which occurred in the Eastern District of Kentucky, not in the Southern District of Florida.

CONCLUSION

In *Connecticut General Life Insurance Company v. Thomas*, 910 F. Supp. 297 (S.D. Tex. 1995), the court faced a situation closely analogous to that presented by the case at bar. One of the parties defendant had moved for Rule 11 sanctions without giving the plaintiff the "safe harbor" notice required by the revised Rule. In denying the motion, the court observed:

> The Court finds even more astonishing the fact that [movant's counsel] quite obviously failed to make a reasonable inquiry into the law governing motions for sanctions before she filed a motion accusing another attorney of failing to make a reasonable inquiry into the law.

Conn. General Life Ins. Co., 910 F. Supp. at 304; *cf.*, *Romans* 2:1 ("thou that judgest another doest the same things").

A similar rule should govern the case at bar. Respondents seek

to sanction the Petitioner, a non-lawyer, because his counsel allegedly made frivolous legal arguments. At the same time, Respondents' counsel, all of whom are experienced attorneys, have absolutely failed to comply with the requirements of the "safe harbor" provision.

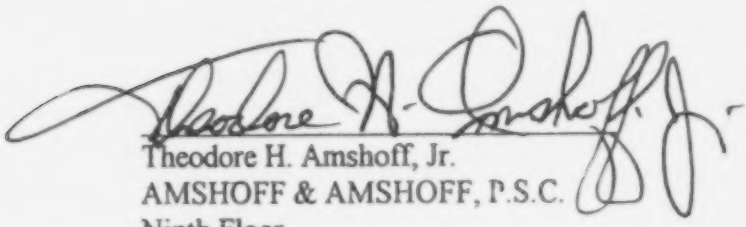
The issues involved in this Petition have an importance and relevance throughout the nation to litigants and counsel in civil proceedings in the courts of the United States. These issues relating to the substantive and procedural requirements for the imposition of monetary sanctions upon parties and their attorneys under the 1993 revisions to Rule 11 have not been otherwise addressed by this Court in any detail.

Lower courts throughout the United States have struggled to differing approaches and standards in the application of the 1993 revisions to Rule 11. For the sake of the parties to this action, as well as to all civil litigants and their counsel, there is a grave, compelling, national need for the guidance of this Court in establishing a uniform jurisprudence on the substantive and procedural issues of Rule 11 sanctions.

For this reason, and for all of the reasons hereinabove set out,

the Court should grant the Petition and review the Judgment of the United States Court of Appeals for the Sixth Circuit in the above-captioned case. Petitioner prays for an Order of the Court so holding.

Respectfully submitted,



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